UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

KEITH G. COLEMAN
Petitioner/Movant

-VS-

UNITED STATES OF AMERICA
Plaintiff

Case No. CV 400-054
CR 497-181-01

TRAVERSE RESPONSE

TO THE

GOVERNMENT'S OPPOSITION

Comes now petitioner KEITH G. COLEMAN, filing pro se, and propria persona, submitting to this Honorable Court, this action in response to the government's opposition of petitioner's 2255 Habeas Corpus.

JURISDICTION

This..... Court has jurisdiction to entertain this motion under Title 28 U.S.C. 2255. The movant hereby, herein fully appears.

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STATEMENT OF FACTS

On Feb. 20, 2000, petitioner file a Title 28 U.S.C. 2255 challenging the **Imposition** of the sentence, stating that he was held accountable for a charge not stated to the Grand Jury, that is; Title 21 U.S.C. 841(1)(a) and further stated that the charge of " Conspiracy to aid and abet the distribution of controlled substance " Title 21 U.S.C. 846 and " Conspiracy to attempt to aid and abet the distribution of controlled substance " Title 21 U.S.C. 846 is an unstated offense, minus the act of the underlying offense. Because the charge declares an agreement to assist in an underlying offense, that did not occur.

Among petitioner's arguement, the government never stated the elements of Title 21 U.S.C 841(1)(a) to the Grand Jury. And petioner was convicted under Title 21 U.S.C. 846, as charged, but never charged or convicted under the substantive offense, but penalized for such.

It is evident that the Grand Jury never was aware of the uncharged substantive offense. The petitioner contends the indictment is structurally defected and constructively amended. Therefore the convicting court **lack jurisdiction to impose penalties.**

The government filed oppositions to the petitioner's claim on Mar. 30th , 2000 in attempt to substantiate its contentions, defendant respectfully files this traverse response to add clarity, to what is an apparent " mischaracterization " of the petitioner's claim by the government, to this Honorable Court.

Petitioner response to the government's opposition of the habeas corpus claim, thus respectfully exhibits an actual showing, of merit and violation of substantial rights of the accused. The petioner likewise contends the government " mischaracterizes " his claim, and attempts to clarify such, as the government is in error.

Refering to the record; (Government's response/opposition)

PG. 3 Sect I, Coleman is procedurally barred;

The government states:

" Coleman in free-ranging attack on his conviction, raises several issues in his 2255 petition, all of which was raised on appeal and decided adversely to him."

And further states on pg. 4 paragraph 2 ;

" Base on the applicable procedural bar, this court should dismiss Coleman's 2255 "

However, the government has erred in that assumption, in respectfully clarifying the issue, the petitioner does not challenge the personal jurisdiction of the United States, or the exclusive jurisdiction of the Federal Court, but rather the jurisdiction or authority to impose a penalty on a uncharged and unstated offense, where no crime has occurred, regardless of location.

This issue was not rasied on appeal, and likewise res judicata is inapplicable to habeas, and transfered to successive petitions, see, Gorden, The Unruly Writ of Habeas Corpus, 26 Mordern L. Rev. 520, 523 (1963), Also see,Sanders v. United States, 373 US 1,16, (1963) holding that; Doubts about whether two grounds are the same or not of course " must be resolved in favor of the applicant." And if the matter was in the former action,if it is not shown that the verdict and judgement

necessarily involved its consideration and determination the issue is not concluded, United States v. Halbrook, 36 F. Supp. 345(E.D.MO. 1941).

Sect. II, Coleman claims are without merit:

As stated in this section, the claim is " mistaking " by the government, the petitioner does not challenge the government's alleged vested jurisdiction by Congress, but its authority to penalize an uncharged offense.

As to sect. (B) PG 5 The charges contained in the indictment are valid, The government states;

" Coleman attacks the charges he was convicted of,claiming that the aiding and abetting theory is inapplicable in the defendant's case. He also claims that the charges do not qualify as " substantive offense" as relevant case law shows, Coleman is incorrect in his assertions.

The goverment goes on to state;
" The appearance of a provision in the current edition of the United States Code is " prima facie " evidence that the provision has the force of law, U.S. Nat. Bank of Oregon v. Independant Ins. Agents of America, Inc. 503 US 439, 448.

However, the essence of this case cited by the government defeats the governments contentions, and substantiates the petitioners position as stated in this same law report,cited by the government, the Supreme Court held that; " Over and over we have stressed that in expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look at the provisions of the whole law, and to its object and policy " United States v. Heirs of Boisdore 8 How 113, 122, 12 L.ED 1009(1849) (quoted in more than a dozen cases) most recently in Dole v. Steelworkers 494 US 26,35,108 L.ED. 2d 23,110 S.CT. 929(1990),

see, also King v. Vincent Hospital, 502 US 116 L.ED. 2d 578, 112 S.CT. 570(1991), statutory construction " is holistic endeavor " United Saving Assn. of Texas v. Timbers of Inwood Forest Assoc. Ltd. 484 US 365, 371, 98 L.ed. 2d 740, 108 S.CT. 626(1988) and at a minimum, must account for a statutes full text, language as well as punctuation, structure, and subject matter. Petitioner refers to the(Grand Jury Transcript pg 3 line 23-25 and pg. 4 line 1-4)(quoting the government);

" The first charge is conversation, 21 U.S.C 846, and that is Conspiracy to aid and abet the distribution of cocaine. And the other remaining counts are all 21 U.S.C. 846, attempt to aid and abet the distribution of cocaine."

The government never stated any elements of Title 21 U.S.C. 841(1)(a) to the Grand Jury. Neither was the petitioner convicted of Title 21 U.S.C. 841(1)(a), but sentence under that statutory provision. It is well settled, " Conspiracy " may be the sole object of a prosecution, or it may be joined in a separate count, with the prosecution of a substantive offense that is the object of the conspiracy. The prosecution is not obliged, though, to prosecute for criminal conspiracy instead of prosecuting the conspirators for the crime that is the object of the conspiracy, State v. Ferguson, 221 SC 300, 70 S.E. 3d 355(1952) cert. denied. 344 US 830, 73 S.CT. 97 L.ED. 646 (1952), also see O'Neil v. State, 237 Wis. 391, 296 N.W. 96, 135 ALR 719(1941).

A defendant may not be convicted on the basis of facts not found by, and perhaps not even presented to, the Grand Jury which indicted him " Russell, 369 US at 700. Finally, the indictment secures the Fifth Amendment guarantee " that the accused is to be tried only on such charges as a Grand Jury has returned," United States v. Bradford 482 A2d 430, 433-33 (D.C. 1984) (Citing Russells 369 US at 771). Thus, even

if it provides adaquate notice, an indictment is defective unless the Grand Jury agreed on all the facts constituting each essential element, as quoted in **Russells.**

The charges are likewise **invalid** because the indictment is structurally defective, and not cured by jury instruction. As stated in the habeas pg 10 line 16 and pg 17 line 12,13, **Conspiracy, Attempt, Aiding and Abetting.** Reasoning, the scope of the conspiracy is determine by the agreement between the persons involved,defendants agreeing with the government agent, to assist him in an allege illegal act. Which this court clearly stated cannot occur.

Since the agreement is seldom visible, inference must be made according to the stake of the persons in the venture and the relations of the parties to the activities. In this account there is a substantial overlap between the parties involved in each action, and the separate objectives each are consistant with and support the overall objective.

Thus each person had a similar stake in the success of the alleged objective. Therefore the appropriate inference is that one agreement was made.Thus the petitioner would be an alleged **co-conspirator** with the government agents, thus this conviction would be to disregard this court's jury instructions precluding an agreement with the government.

For if the accused cannot conspire with the government agent, then most certainly, petitioner cannot assist(aid and abet) that same agent in an agreement that's precluded. Surely as these charges does not apply separately, Neither can they apply cumulatively, petitioner cannot conspire to aid and abet a government agent, stated another way, to agree to assist the government agent in the object of the offense, the same agreement that this court precluded.

Moreover the indictment is structurally defected, alleging triple predictcates for the same unstated substantive offense; **18 U.S.C. 2**

" whoever commits an offense against the United States or aids, abets, counsels, command, induces or procures its commission is punishable as a principal.

Now Title **21 U.S.C. 846** defines;

" That any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the object of the offense, the commission of which was the object of the attempt or conspiracy.

Now Title 21 U.S.C. 846 establishes an offense against the United States and Title 18 U.S.C. 2 punishes the same offense as a principal, for 18 U.S.C. 2 does not contain its own schedule of punishment or creates a new crime,but rather makes the aider and abettor punishable as a principal for the offense that was allegelly aided and abetted, that is punishment imposed under the statute creating the offense, and no other statute.

Furthermore when an accomplice's action is part of the definition of the offense, as stated in Title 21 U.S.C. 846, he is not an aider or abettor but a co-conspirator, see United States v. Southward, 700 F2d, 1, 20(1st Cir. 1983). A prosecutor need not choose whichever statute is most favorable to the accused, United States v. Batchelder 442 US 114, 99 S.CT. 2198, 60 L.ED. 29, 775 (1979). But prosecutor must find a statute that is applicable and the interplay among provisions help the defendant and the court to know the statute's domain. See United Saving Assn. of Texas v. Timbers of Inwood Forest Assoc. Ltd. 484 US 365,371 98 L.ED. 2d 740, 108 S.CT. 626 (1988)"statutory

construction", the fact that the sentences are current does not relieve the court's obligation to scrutinize each count upon which the defendant was convicted , United States v. De Bright 730 F2d 1255 (9th Cir. 1984)(En Banc) because the jury cannot ascertain whether the conviction is base on Conspiracy, Attempt or Aiding and Abetting.

This is why the charges are foreign to the USSG and cannot apply to its procedures, but rather affirms the petitioners position, that the stated charges are inapplicable to the USSG. Stated another way, aidind and abetting is not a separate charge offense, but it is an alternative charge in every indictment, whether explicit or implicit see U.S. V. Neal 951 F2d 630,633(5th Cir 1992), and provides means of convicting someone of the substantive offense,U.S. v. Gordon 812 F2d at 968.

For such a charge to conform to the USSG, the accuse would have to be sentence, twice for each count,the underlying offense defined in the conspiracy, and the punishment as the principal in the aiding and abetting statute. The government must choose.

As to pg 5 Sect 1 Attempt to Aid and Abet

The government states;

> " In answering the defendant's challenge as to the validity of the charge in that case, the court stated(D.C. Cir.) that " this circuit and other circuits have routinely affirmed charges of aidind and abetting an attempt Id. U.S. v. Washington 106 F3d 983 (D.C. Cir).

The case cited by the government is clearly distinguishable from that of the petitioner's case. The charges are different, there is a substantive offense charged. And aiding and abetting an attempt is not equivalent to conspiracy to attempt to aid and abet and offense.

Ground Nine 3

Unlike D.C. petitioner's charges of aiding and abetting was stipulated as an element of the " conspiracy " or " agreement " and completeness in this case. Thus distribution of controlled substance becomes the necessary included offense of the charge, that is; Conspiracy to aid and abet the distribution of controlled substance. Otherwise, the offense is unstated, void of the essential element, " the substantive offense," which is a fatal defect in the charged offense, see U.S. v. Superior Suppy Inc. 982 F2d 173. The defendant in **Washington** was charged with conspiracy, attempt possession of cocaine with intent to distribute, 21 U.S.C. 846 and 21 U.S.C 841 (1)(a). Unlike petitioner charges by the Grand Jury, D.C. case is not controlling.

But this circuit (11th Cir.) has constantly held; the standard test for determining guilt by aiding and abetting is to determined whether a substantive offense was committed by someone, whether there was an act by the defendant which contributed to and furthered the offense, and whether the defendant intended to aid its commission,U.S. v. Jones 913 F2d 1552, 1558(11th Cir. 1990), U.S. v. Kelly 888 F2d 732 (11th Cir. 1989)

The government must demonstrate beyond reasonable doubt(1) that the petitioner willfully associated himself with criminal venture and willfully participated, as it were something he wish to bring about. (2) that each element of the offense that petitioner is accused of aiding and abetting was committed by some other person. U.S. v. Parekh 926 F2d at 407, because the charge is an agreement to assist in an unlawful act of distributing controlled substance.

The allegation of the charging instrument skips a vital step, the acts that constitutes the aid and abetting, which are not illegal

unless they actually do further the distribution of controlled substance. Thus a conspiracy to commit these acts is not illegal unless the acts would further the actual on going distribution of controlled substance. Because the illegal act to which defendant have allegelly conspired, the " unlawful object of the conspiracy " is " aiding and abetting " the distibution of controlled substance." see also Direct Sales v. United States, 319 U.S. 703, 63 S.CT. 1265, 87 L.ED. 1674 (1943).

Yet no distribution occurred in this instant case, or any crime, (see P.S.I. PG.5 Sect.4) Also indictment for aiding and abetting in acts not constituting crime does not charge offense Manning v. Biddle CC. A. Kan. 1926 14 F2d 518.

The government failed to cure the defect of how to combine the crime of an alleged conspiracy, which does not require proof of the underlying substantive offense, with aiding and abetting offense, which does not exist without one. For if the charge were merely " conspiring to distribute controlled substance, the government would have to only prove an agreement between defendants and distributors. Had the the defendant been charged with " aiding and abetting " the distribution of controlled substance, the government would not have to prove an agreement between defendants and distributors, but would have to prove that defendants knew their was actual distribution, or intended distribution, and intended to assist in the unlawful act.

But in conspiracy to aid and abet the distribution of controlled substance, distribution is the inescapable necessary included offense, to be the unlawful agreement of the crime charged. Thus the application of the charge by the government requires proof of the underlying

offense, or the charge is not stated. And the court does not have jurisdiction to impose a penalty. Neither does the charge satisfy the Hamling requirement, see Hamling, 418 US 117 94 S.CT. at 2907, because it fails the " essential element," since the distribution of controlled substance is an essential element of " Conspiracy to aid and abet the distribution of controlled substance, and not merely a component of the underlying offense.

Refering to pg. 9 (c) The evidence was sufficient to sustain the conviction ,

The government mistakes the petitioner's claim, the only challenge of evidence by the accused is that the government charged the accused with Conspiracy to aid and abet the distribution of controlled substaance, and facts at the trial proved different from the charge, that is no distribution was intended or occurred, see(P.S.I. PG. 5 Sect 4) Thus there is a fatal variance here, that rises to the level of reversable error see U.S. v. Homick 964 F2d 899 on fatal variances. Also see U.S. v. Von Stoll, 726 F2d 584, 586(9th Cir. 1984). The defendant was not charged with distribution under Title 21 U.S.C. 841(1)(a) by the Grand Jury, or convicted under that statutory provision, thus defendant is held accountable for offense not charge, which is constructive amending, considered prejudicial per se, Stirone v. United States, 361 US 212, 80 S.CT. 270, 4 L.ED. 2d 252 (1960). Also see U.S. v. Scott 993 F2d 1520 (11th Cir. 1993), United States v. Floresca 38 F3d 706, 710 (4th Cir. 1994).

Refering to pg 10 Paragraph 3 There was no error at sentencing

The government states; " Coleman arguement is defeated bt the plain language of the statue, 21 U.S.C. 846 which provides that " any person who attempts or conspires to commit any offense defined in this

subchapter shall be subject to the penalties as those prescribed for the offense, the commission of which the object of the attempt or conspiracy" the language of 18 U.S.C. 2 states that whoever commits an offense against the United States or aids, abets... or procures it commission, is punishable as a principal."

The government goes on to state;

" Section 2X1.1 of the United States Sentencing Guidlines specifically states the base offense level for an Attempt or Conspiracy is the same as " the base offense level for the substantive offense.

The petitioner agrees, however there must yet be a substantive offense charged in the charging instrument that the alternative charge of aiding and abetting, or conspiracy to be the subject or predicate offense of. Had Congress intended that the aiding and abetting provisions that carries the penalty of its own substantive offense, was jointly applicable to the conspiracy provisions which punishes the same substantive offense define in its subchapter, which is the object of the conspircy, she would have define such under 2X1.1 of USSG.

Thus Aiding and Abetting, Attempt and Conspiracy, punishes the same offense that does not exist. The charges in the indictment makes an erroneous statement of law, and appears to violate the Double Jeopardy Clause of the Fifth Amendment.For a defendant cannot conspire to aid and abet the same offense, the USSG is inapplicable to defendant's case. Furthermore the USSG does not state an **Attempt** and **Conspiracy**, but rather **Attempt** or **Conspiracy.**

However the circumstances of previous cases might have been is unknown to the accused, but in the instant case, defendant cannot both " conspire to aid and abet "**Conspiracy, Attempt, Aiding and Abetting**, the same substantive offense in this case is inapplicable to

to the **USSG,** and foreign to its well established procedures. The government also contends that the court considered both (1) reasonable forseeability(2) the scope of the jointly undertaken criminal activity petitioner allegelly agreed upon.

This contention by the government, is inapposite, there can be no attribution of drug amounts to the accused where no crime has occurred and likewise no drug amount can be attributed to the allege conspiracy that does not exist. As this court stated one cannot conspire with the government. Neither can the court attribute drug amounts to aiding and abetting a conspiracy that does not exist. And is likewise void of a substantive offense.

CONCLUSION

Petitioner contends the government's case is schizophrenia, it alleges a conspiracy that does not exist, and conspiracy jointly with aiding and abetting the same offense. It omits the necessary included offense, that is; the actual distribution of the charge of Conspiracy to aid and abet the distribution of controlled substance. It does not charge or state any elements of Title 21 U.S.C.841(1)(a), but penalizes for such. It presecutes a crime that the law does not make criminal, and the court has no jurisdiction to impose penalties for.

Finally, it convicts the petitioner of offenses this court stated that defendant could not be convicted for, that is conspiring with a goverment agent, neither could the accused aid and abet that same agent.

RELIEF SOUGHT

WHEREFORE, petitioner respectfully request this Honorable Court grant relief as to; (1) dismiss the indictment with prejudice as a matter of law or;(2) Vacate petitioner's sentence, and remand back to the District Court for appropriate preceedings.

Respectfully Submitted

07 Mar. 2000

DATE

KEITH G. COLEMAN 09587-021

CERTIFICATE OF SERVICE

I, KEITH G. COLEMAN hereby certify that I have served a true and correct copy of the following: U.S. Department of Justice
United States Attorney
Southern District of Georgia
P.O. Box 8999
Savannah, Georgia 31412

Which is deemed filed at the time it was delivered to prison authorities for forwarding to the court, *Houston v. Lack*, 101 L.Ed.2d 245 (1988), upon the court and parties to litigation and or his/her attorney(s) of record, by placing same in a sealed, postage prepaid envelope addressed to:

and deposited same in the United States Postal Mail at the United States Penitentiary, Lompoc, California, on this: 7th day of: April, 2000.

KEITH G. COLEMAN 09587-021
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